

Office of the Attorney General
State of LOUISIANA

Opinion No. 79-1402
December 20, 1979

MUNICIPAL FIRE & POLICE CIVIL SERVICE 71-1-1
MUNICIPALITIES 71

Discussion concerning appointments to Municipal Fire and Police Civil Service Board, qualifications and proper method of removal.

Mr. Philip J. Boudousque
Attorney for the Kenner Police Department
1801 Williams Boulevard
Kenner, LOUISIANA 70062

Dear Mr. Boudousque:

You have requested an opinion from our office concerning the Municipal Fire and Police Civil Service Board for the City of Kenner. The opinion is requested on behalf of Mr. Salvador Lentini, Chief of Police for the City of Kenner.

First, you ask for our opinion in answer to the following questions:

'1. In satisfying the legal requirements of LA. R.S. 33:2476(c)(2) can the nominating list for municipal civil service board membership be selected and forwarded to the institute of higher learning by the governing authority or must this nomination list independently originate from the executive head of the selected institution?

2. If it is deemed inappropriate and contrary to state law that the nominating list had its genesis in the governing authority, should the appointees chosen by this method be prohibited from acting in any official capacity on the Civil Service Board and immediately removed from office?'

In the request you submitted a statement of facts along with attached exhibits. You state that the President of the City of Kenner Council requested acceptance and certification of a list of four nominees submitted by the Council as qualified candidates in the selection for board membership on the Municipal Fire and Police Civil Service Commission. You state that the president of a local university granted approval of the list and you attached a copy of the approval letter which stated in part:

'In compliance with your request and in accord with the applicable State law, I am furnishing as nominees for appointment to the above board the four persons whose names and addresses you had submitted to me: . . .'

You also state that on February 19, 1979, the Council promulgated resolution

No. B-1963 in an attempt to rectify the appointment procedure and to ratify past board action.

R.S. 33:2476(C) provides for the appointment of members of the board as follows:

'The members of the board shall be appointed by the governing body as follows:

(1) One shall be appointed by the governing body upon its own nomination.

(2) Two members shall be appointed from a list of four nominees, which shall be furnished within thirty days after receiving such request by the executive head of a legally chartered and established institution of higher education located within the municipality; or, if there is no such institution in the municipality, by the executive head of any such institution of the governing body's choice within the state.

(3) Two members shall be appointed who shall be first nominated and elected by and from the regular employees of the fire and police departments as follows. . . .' (Emphasis added).

Under the above statute it is clear that the Council can appoint one member to the board upon its own nomination. The Council also appoints two members from a list of four nominees which is furnished upon request by the head of an institution of higher education. The four nominees must originate from the institution of higher education and not from the Council. In our opinion it would be contrary to the state law for the list of four nominees to originate with the Council. The Council should not in any way supply nominees to the head of the institution of higher education.

In answer to your second question, we must rely on the case of *Fakier v. Picou*, LA. App. 158 So. 2d 285 (affirmed 246 LA. 639, 116 So. 2d 257, 1964). In that case the court held in part on page 287 as follows:

'In answer to the first contention of the defendants regarding the illegal constitution of the Board, plaintiff contends that even if said Board were not constituted in strict compliance with the statute and ordinance, it nevertheless is a de facto board and same cannot be attacked collaterally.

Both LSA-R.S. 33:2476, Subsection C, and the Ordinance of the City of Houma provide the Board shall be composed of five members, one appointed by the governing authority, two to be nominated and elected by and from the regular employees of the Fire and Police Departments, and two so-called public representatives to be appointed by the governing authority from a list of four nominees furnished by the executive head of a legally chartered and established institution of higher education located within the municipality, or, if no such institution is in the municipality, by the executive head of any such institution of the governing body's choice within the State. The record is clear that in appointing the Houma Municipal Fire and Police Civil Service Board there was not strict compliance with the method of appointing

the public members since the governing body submitted a list of four nominees to the President of Francis T. Nichols State College and instructed him to select two of the four names submitted, rather than the reverse, that is, the President submitting four names to the City Council for their selection of two nominees.

The Trial Court held in connection with this point as follows:

'* * * The record reveals that this present Board was appointed on or about October 31, 1961 as shown by Stipulation Exhibits 1, 2, and 3, and this Board has functioned since said period of time until the issue of its legality has been raised in this proceeding. A review of the record in this case as well as the applicable law convinces this Court that there has been a sufficient compliance with the law in the appointment of this Board and certainly sufficient compliance to make it at least a de facto board whose acts must be recognized under the holding of the Supreme Court in the case of State v. Hargis, 176 LA. [179] 623, 154 So. 628.

"There is no question that the present Board had been acting as such since its creation October 31, 1961, and the record is clear that defendants in this case had or should have had knowledge of the hearing held by said Board, and, although not officially represented defendants were unofficially represented at the hearing. Defendants had the opportunity to raise the issue of the legality of the Board, or could have, as they should have done if they wanted to test the legality of the Board by filing a suit to try the right of office under the provisions of LSA-R.S. 42:76 et seq., rather than attempt to attack collaterally the legality of the Board.

"It is well established under LOUISIANA jurisprudence that acts of a de facto officer cannot be attacked by collaterally bringing into question his title to the office. State v. Smith, 153 LA. 577, 96 So. 127; State v. Phillips, 164 LA. 597, 114 So. 171.

"This Court is in agreement with the finding of the Trial Judge on this point that regardless of whether there was strict compliance with the law in constituting the Board, it was a de facto Board and, therefore, under the jurisprudence of this State it is the opinion of this Court its legality cannot be attacked collaterally in this proceeding." (Emphasis added).

Under this case it is the opinion of this office that even though two members of the board may not have been appointed in strict compliance with the law, they would nevertheless be de facto board members. As stated by the court, the proper method to test the legality of the board or any of its members is under the provisions of R.S. 42:76 et seq.

Secondly, and separate and apart from the appointment procedure, you raise

two questions concerning whether one person who was certified in March and again in July of 1979 is statutorily eligible for appointment and service on the Municipal Fire and Police Civil Service Board.

You state that in March, 1979, prior to board confirmation, this person formulated and became president of the Kenner Voters League and apparently maintains that position and affiliation with the organization. You attached a copy of the constitution and by-laws of the organization.

In light of the above you ask our opinion in answer to the following questions:

'1. If in fact the Kenner Voters League has as part of its functions partisan political activities, should any officer or any member of a committee of that organization be ineligible for appointment or service on a Municipal Fire and Police Civil Service Board?

2. If question number 1, supra, is answered affirmatively, should any such individual appointed to the board be prohibited from acting in any relative official capacity and immediately removed from office?'

R.S. 33:2476(B) provides in part:

' . . . No member of a board shall have been, during a period of six months immediately preceding his appointment, a member of any local, state, or national committee of a political party, or an officer or member of a committee in any factional political club or organization. No member of a board shall be a candidate for nomination or election to any public office or hold any other public office or position of public employment, except that of notary public, military or naval official office, or that of a municipal fire or police department which is expressly required by the provisions of this Part.'

In answer to your first question, it is the opinion of this office under the above-quoted statute that if, in fact, the Kenner Voters League is a factional political organization, any officer or any member of a committee of that organization would be ineligible for appointment or service on the Municipal Fire and Police Civil Service Board. Any person who is a member of a factional political organization would be ineligible to be a member until he had disassociated himself from such membership for at least six months.

In answer to your second question, it is the opinion of this office that even though such a person was ineligible to be appointed to the board and even continues to be ineligible for membership on the board, his removal must be done under the provisions of R.S. 42:76 et seq. (See *Kilbourne v. Dugas*, LA. App. 180 So. 2d 440 (1965), appeal after remand 195 So. 2d 179).

We hope this opinion is of assistance to you in this matter and if further help is needed, please call on us.

Sincerely,

William J. Guste, Jr.
Attorney General

By William T. Reeves, Jr.
Assistant Attorney General

La. Atty. Gen. Op. No. 79-1402, 1979 WL 38299 (La.A.G.)
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